UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

CONSTELLATION BRANDS,
U.S. OPERATIONS, INC.
D/B/A WODBRIDGE WINERY

and **Cases 32-CA-186238**
32-CA-186265

CANNERY, WAREHOUSEMAN, FOOD PROCESSORS, DRIVERS AND HELPERS, LOCAL UNION NO. 601, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

COUNSEL FOR THE GENERAL COUNSEL'S SUPPLEMENTAL BRIEF TO THE ADMINSTRATIVE LAW JUDGE

Respondent has violated Section 8(a)(1) of the Act by maintaining a "Company Short-Term Incentive (Bonus) Plan" ("the Bonus Plan rule") which premises employees' eligibility to participate in Respondent's program on their non-union status.[1] As set forth more fully below, because the Bonus Plan rule is facially discriminatory, the framework established in *Boeing Company*, 365 NLRB No. 154 (2017) simply does not apply and there is no balancing of interests required. In *Boeing*, when evaluating a facially neutral rule that potentially interferes with the rights protected by Section 7 of the Act, the Board will evaluate: (1) the nature and

[1] The record in this matter reopened on April 26, 2018, following Administrative Law Judge Ariel L. Sotolongo's decision to permit the introduction of evidence concerning the Bonus Plan rule as currently alleged in Paragraph 7(2) of the Complaint, in light of the Board's recent decision in *Boeing Company*, 365 NLRB No. 154 (2017). Following the hearing, Administrative Law Judge Sotolongo directed the parties to submit briefs on the legality of the Bonus Plan rule.

extent of the potential impact the rule has on Section 7 rights; and (2) the employer's legitimate justifications associated with the rule in question. Id., slip op. at 3.

Here, the Employer's Bonus Plan rule is not facially neutral because it expressly conditions a benefit upon non-representational status. Under the heading of "ELIGIBILITY", the Bonus Plan rule states:

> "All non-union, regular full-time and part-time employees of the Company are eligible for the incentive plan." (Jt. Exh. 5 at 27).

The *Boeing* analysis does not apply and the rule is unlawful because it expressly discriminates along union lines. See *Goya Foods of Florida*, 353 NLRB 1118, 1131 (2008)(finding unlawful employer statement that the retirement and 401(k) plan excluded union employees); *Ryder Truck Rental, Inc.*, 34 NLRB No. 109, slip op. 1 at 9 (2004)(finding unlawful employer's new vacation policy that excluded employees operating under a collective-bargaining agreement); *Voca Corp.*, 329 NLRB 591(1999)(finding unlawful employer's issuance of corporate wide bonus program that automatically excluded union represented employees); *Niagara Wires, Inc.* 240 NLRB 1326, 1328 (1979)(finding employee benefit plan which restricts coverage to unrepresented employees to be a *per se* violation of the Act).

Even if *Boeing* did apply, the rule is still unlawful because Respondent has failed to establish any legitimate justification for expressly discriminating based on whether an employee is union or non-union. Although not part of the balancing test itself, in *Boeing*, the Board discussed three categories of potentially unlawful rules. *Boeing*, supra, slip op. at 3. The Board explained that Category 1 rules are those that are lawful to maintain, either because (1) the rule, when reasonably interpreted, does not prohibit/interfere with Section 7 rights; or (2) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Id., slip op. at 4, 15. The Board classified Category 2 rules as those that warrant individual scrutiny

as to whether the rule would prohibit or interfere with Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by the employer's legitimate justifications. Id. Finally, Category 3 rules are unlawful and are not subject to the balancing test because the adverse impact on Section 7 rights is not outweighed by any justifications associated with the rule. Id. See *Lowe's Home Centers, LLC*, JD(SF)-10-18, 7 (April 17, 2018). In the instant matter, given that the Bonus Plan rule is expressly discriminatory on its face, it would be incorrect under Boeing to engage in any balancing test.

However, even if viewed as a Category 2 rule, the Bonus Plan rule is unlawful because Respondent has not introduced any legitimate business justifications which outweigh the harm to employees' Section 7 rights. Indeed, at the hearing, Respondent's Human Resources Manager, Dana Durand, failed to articulate Respondent's business justifications for the Bonus Plan rule, let alone explain them. Instead, she essentially testified that the Bonus Plan rule is not really enforced, because all employees at Respondent's Woodbridge facility are actually eligible to participate in the Bonus Plan. (Tr. 338-339). In this regard, Respondent introduced samples of offer letters which include express language explaining employee eligibility for the Bonus Plan that Respondent has issued and continues to issues to new hires as part of its onboarding practice at its Woodbridge facility. (See Resp. Exh. 1; Resp. Exh. 2). While Durand could not confirm that Respondent's other facilities provide new hires with the same offer letter, even assuming that Respondent uses a similar letter at all of its facilities on a nationwide basis, this does not cure the maintenance violation.[2] Nor does the use of such an offer letter constitute a business justification for the maintenance of the discriminatory Bonus Plan rule in Respondent's Handbook. Here, the issue before the Administrative Law Judge is whether Respondent has

[2] Durand testified that Respondent employs a different sample letter for unionized employees at its unionized Mission Bell and Dunwood facilities. (Tr. 370-372).

violated Section 8(a)(1) of the Act by maintaining the Bonus Plan rule. Therefore, any consideration of whether or not Respondent has consistently enforced its eligibility of the rule is irrelevant.[3]

More importantly, Durand's testimony regarding the practice at its two unionized facilities only highlights the fact that Respondent's rule expressly discriminates along Union lines. Respondent's stated justification for the Bonus Plan rule is its purported need to distinguish between unionized and non-unionized facilities.[4] Durand testified that Respondent issues unionized employees at Mission Bell and Dunwood a different offer letter and a different employee handbook than the one at issue here, (Tr. 357;360), both of which are notably silent on employees' eligibility in the Bonus Plan and instead direct employees to review their collective-bargaining agreement for an explanation of their benefits. (See Resp. Exh. 3; Resp. Exh. 4 at 30). Durand further confirmed that the non-unionized employees at Mission Bell and Dunwood receive the Handbook. Thus, Respondent provides its Handbook to all employees who work at non-unionized facilities, like the Woodbridge facility, and to non-union employees employed at a unionized facility. As such, Respondent's factual basis for the purported justification for the Bonus Plan rule falls apart. Plainly, there is no need for the Bonus Plan rule to have a stated distinction between union and non-union to avoid confusion at unionized facilities where its unionized employees receive a different handbook. Nor has Respondent established that its

[3] Any argument that Respondent's offer letters cures the coercive effect of an unlawful rule must be rejected because the offer letters in no way specifically, effectively or timely disavows or repudiates the Bonus Plan rule. *See*, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) and progeny.

[4] On May 3, 2017, General Manager Josh Schulze testified that Respondent operates facilities located throughout the United States, including two unionized facilities. (Tr. 209). Schulze further testified that the intent behind the Bonus Plan rule was to "factually state that we have two non-union […] sites in the Company. And though their negotiated agreement […] they do not and are not eligible for a bonus. Whereas all the other facilities, which [are] nonunion, are eligible for a short-term incentive or bonus." (Tr. 209).

purported justification for the Bonus Plan rule is significant enough to outweigh the adverse impact upon employees' Section 7 interests. In sum, Respondent has wholly failed to introduce evidence of any legitimate justification for the discriminatory Bonus Plan rule. Absent a legitimate justification for the Bonus Plan rule, the only thing that is clear is the inherently coercive nature of the Bonus Plan rule that signals to employees that if they were to choose union representation, then they would have to forfeit the benefits of the Bonus Plan.

Finally, Counsel for the General Counsel reasserts its request for a nationwide remedy since the Bonus Plan rule is maintained on a nationwide basis as is indicated in the Handbook itself. (Jt. Exh. 5 at 5). Further, despite General Manager Schulze testifying that the Handbook is maintained at *all* facilities in the United States except the two unionized ones (Tr. 209, lines 5-12), Human Resources Manager Durand admitted that the Handbook at issue is nevertheless also maintained at those two unionized facilities. (Tr. 370). As noted in the General Counsel' prior brief dated June 8, 2017, where an employer violates Section 8(a)(1) of the Act by maintaining an unlawfully overbroad workplace rule, the traditional remedy of posting a notice is generally ordered at each location where the rule is in place, as well as electronic distribution (such as by email, posting on an intranet or internet site, and/or other electronic means) along with rescission of the unlawful rule and notice to the employees that the unlawful rule has been rescinded and will no longer be enforced. See e.g., *MasTec Advanced Technologies*, 357 NLRB 103, 109, 100 (2011); *Guardsmark, LLC,* 344 NLRB 809, 811-12 (2005), enfd. 475 F.3d 369, 380-381 (D.C. Cir. 2007). See also, e.g., *Long Drug Stores of California*, 347 NLRB 500, 501 (2006)("The Board has 'consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of

its facilities where the unlawful policy has been or is in effect.'") (quoting *Guardsmark, LLC*, supra).

CONCLUSION

Based on the foregoing, Counsel for the General Counsel respectfully requests that the Administrative Law Judge issue an Order requiring Respondent to cease and desist from maintaining the Bonus Plan rule, to cease and desist from further like or related unlawful conduct, to affirmatively order Respondent to rescind the rule and advise employees in writing that the rule is no longer being maintained, and to furnish employees with either inserts to the handbook or to publish a revised handbook, and to post the proposed Notice to Employees, attached as Appendix A, at all of its facilities where the handbook has been maintained, to post the proposed Notice to Employees, attached as Appendix B, at its Acampo facility, and to order such other relief as may be necessary and appropriate to effectuate the policies and purpose of the Act.

DATED AT Oakland, California, this 30th day of May 2018.

Respectfully Submitted,

/s/ Lelia M. Gomez

Lelia M. Gomez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612
Lelia.Gomez@nlrb.gov
Telephone: (510) 637-3300
Facsimile: (510) 637-3315

APPENDIX A

(Proposed Notice for All Facilities)

NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain language in our employee handbook in the Eligibility portion of the Short-Term Incentive Plan section that states "All non-union, regular full-time and part-time employees of the Company are eligible for the incentive plan."

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the rule in our handbook as described above, in the Eligibility portion of the Short-Term Incentive Plan section and **WE WILL** inform you, in writing, that the rule is no longer being maintained.

WE WILL furnish you with an insert for the current employee handbook that advises that the unlawful provision has been rescinded and is no longer being maintained or **WE WILL** publish and distribute revised employee handbooks that do not contain the unlawful provision.

Constellation Brands, U.S. Operations, Inc., d/b/a Woodbridge Winery
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB

(1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay St Ste 300N
Oakland, CA 94612-5224

Telephone: (510)637-3300
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

APPENDIX B

(Proposed Notice for Acampo Facility)

NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT interfere with, restrain, or coerce our employees by prohibiting you from discussing or wearing articles of clothing with messages pertaining to the exercise of activities protected under Section 7 of the Act, such as "Cellar Lives Matter."

WE WILL NOT maintain language in our employee handbook in the Eligibility portion of the Short-Term Incentive Plan section that states "All non-union, regular full-time and part-time employees of the Company are eligible for the incentive plan."

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the rule in our handbook as described above, in the Eligibility portion of the Short-Term Incentive Plan section and **WE WILL** inform you, in writing, that the rule is no longer being maintained.

WE WILL furnish you with an insert for the current employee handbook that advises that the unlawful provision has been rescinded and is no longer being maintained or **WE WILL** publish and distribute revised employee handbooks that do not contain the unlawful provision.

Constellation Brands, U.S. Operations, Inc., d/b/a Woodbridge Winery
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay St Ste 300N
Oakland, CA 94612-5224

Telephone: (510)637-3300
Hours of Operation: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.